Union Local 1814, International Longshoremen's Association *and* Amstar Sugar Corporation. Case 29–CB–7395

February 19, 1991

ORDER GRANTING REQUEST TO WITHDRAW

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On November 22, 1989, Administrative Law Judge Howard Edelman issued the attached decision finding that the Respondent refused to bargain in good faith and thus violated Section 8(b)(3) of the Act by commencing a strike on September 30, 1989, without having provided the notices to the Federal and state mediation services in the timely manner required by Section 8(d)(3) and (4) of the Act. The Respondent filed exceptions and a supporting brief. The Charging Party, by letter of February 9, 1990, filed a request with the Board for withdrawal of the charge based on a settlement agreement reached by the Charging Party and the Respondent on December 1, 1989. The General Counsel, by letter of February 28, 1990, opposed the request. The Respondent, by letter of March 5, 1990, filed a response to the General Counsel's opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, brief, the settlement, the Charging Party's request, and the General Counsel's opposition to the request. For the reasons stated below, we have decided to grant the request and give effect to the settlement agreement by dismissing the complaint allegations.

We first briefly set forth the history of this proceeding. Charging Party Amstar and the Respondent Union have had a bargaining relationship for more than 20 years. Their most recent collective-bargaining agreement expired on September 30, 1989. On July 17, the Union timely served on Amstar the notice of termination of the agreement required by Section 8(d)(1) of the Act. On August 30, 1989, the Union mailed notices to the Federal Mediation and Conciliation Service and New York Mediation Service which were received on September 11 and 5, respectively. The Union began a strike against Amstar on September 30. On October 2, Amstar filed a charge alleging a violation of Sections 8(b)(3) and 8(d) and requested the Region to institute 10(j) proceedings to enjoin the Union from further violation of the Act. The complaint issued on October 6 and 7 and a hearing was held on October 24. Also on that latter date the Board authorized the General Counsel to seek 10(j) relief. On November 13, the district court found that the Union had failed to bargain collectively under Section 8(b)(3) by failing to provide the Federal and state mediation services 30 strike-free days as required by Section 8(d).[1] The court, however, denied the requested injunctive relief on the ground that the time periods actually available to the services to mediate the dispute, though less than the prescribed 30 days,[2] were ''not insignificant.''

On November 22, the administrative law judge issued his decision, based on a stipulated record, finding that the Union had violated Section 8(b)(3) by first serving its 8(d)(3) notices late, i.e., more than 30 days after the 8(d)(1) notice of July 17, and then striking within 30 days of the mediation services' receipt of the 8(d)(3) notices.

On or about December 1, 1989, Amstar and the Union executed a ''Memorandum of Settlement'' in which they agreed that Amstar would rescind suspensions and provide backpay for certain employees and reinstate another employee in return for the Union's withdrawal of the underlying contractual grievances then pending arbitration. Additionally, Amstar agreed to seek withdrawal of the instant unfair labor practice charge. Finally, the Union ended its strike and promised that in the future ''the Union and its members will conduct their activities so as not to interfere with the paramount interest of maintaining refinery operations.''

In *Independent Stave Co.*, 287 NLRB 740, 743 (1987), the Board outlined factors to be considered in evaluating non-Board settlements. The factors were as follows:

> . . . all the surrounding circumstances including, but not limited to, (1) whether the charging party[ies], the respondent[s] and any of the individual discriminatee[s] have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Examining the private settlement agreement before us in light of this test, we find that it sufficiently assures adequate protection of the policies underlying the Act. For while there is a ''public interest in the vindication of statutory rights''[3] there is an ''equally

[1] *Alvin Blyer & Amstar Sugar v. Union Local 1814 (ILA)*, Case 89 CV 3565 (E.D.N.Y., Nov. 13, 1989).

[2] Twenty days for the Federal Mediation and Conciliation Service (FMCS) and 26 days for the New York State Mediation Service.

[3] *Independent Stave* at 742, citing *Clear Haven Nursing Home*, 236 NLRB 853, 854 (1978).

important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation.''[4]

First, the Charging Party and the Union are fully satisfied by the settlement that provides essentially the same remedy for the Union's unfair labor practice that the Board would have ordered upon adopting the administrative law judge's decision—cessation by the Union of the unlawful strike and a promise on behalf of itself and the employees to refrain from interference with refinery operations.[5]

As to the second criterion of *Independent Stave*, we find the settlement reasonable. Although the settlement was reached after the administrative law judge's decision issued, and thus very late in the decisional process, we nevertheless find that the particular facts underlying this alleged violation of the 8(d) notification requirements militate in favor of accepting the settlement.

The congressional policy underlying the 8(d) requirement that a party provide 30 days' notice to the Federal and state mediation services before striking is that the mediators have sufficient time to help resolve the dispute. Here, as the judge found, the Union did provide the 8(d)(3) notices but failed to coordinate their filings adequately with the actual date on which the strike began. As a result, the mediation services actually had only between 20 and 26 days rather than the required 30 days to aid negotiations between the parties. We agree with the district court judge in the injunction proceeding that these are ''not insignificant periods.'' We further note his finding that even within the almost 3 weeks actually available before contract expiration Amstar never tried to enlist the help of the Federal mediator assigned to the dispute.[6] Thus, we find the December 1, 1989 settlement ending the strike to be reasonable in light of what the district court judge characterized as a ''technical violation'' against ''a party little interested in mediation.''

Finally, we find that nothing in this record reveals evidence of fraud, coercion, or duress by any party[7] or that the Respondent has any history of violating the Act or of breaching previous settlement agreements. Accordingly, we conclude that since the parties' own settlement has served to restore industrial harmony, the purposes of the Act are best served by permitting the Charging Party to withdraw the charge even at the cost of public vindication of the unfair labor practice.

ORDER

The Charging Party's request to withdraw the charge is granted and the complaint is dismissed.

CHAIRMAN STEPHENS, dissenting.

I disagree with my colleagues' acceptance of this settlement agreement. I find, after evaluating the settlement in light of the circumstances under which it was reached, that it provides too little in terms of a remedy for the alleged unfair labor practice and, as settlement for that alleged unlawful conduct, has been proffered too late. Accordingly, I would deny the Charging Party's request to withdraw its charge and would adopt the administrative law judge's decision finding that the Union violated Section 8(b)(3) by failing to adhere to the 8(d)(3) requirements that the Federal and state mediation services have 30 days' notice before the commencement of a strike.

In terms of factors specified in *Independent Stave Co.*, 287 NLRB 740 (1987), I rely on the General Counsel's opposition to the settlement, the absence of significant litigation risk for the General Counsel as proponent of the complaint, my judgment that the remedy is inadequate in light of the late stage of the litigation at which the Respondent offered to settle, and what I see as the coercion of an unlawful strike impelling the Charging Party's agreement to the settlement.

As to coercion, I note that the settlement was reached 2 months into a strike that, pursuant to the findings of the judge, was an unlawful strike; and I further note that it was reached after the Federal district court's denial of the Board's request for temporary injunctive relief.[1] At that point, the Respondent possessed the leverage of a strike that could not be subject to another injunction in the immediate future. The Charging Party's withdrawal of the unfair labor practice charge, then, was an apparent quid pro quo for the cessation of the strike, notwithstanding the receipt of a favorable decision based on that charge and the likelihood that that decision would be sustained on review. In this latter regard, I note that the case was decided on a stipulated record, and the legal issues are

[4] Ibid.

[5] We note, however, that the General Counsel opposes the settlement, essentially on the theory that it was the strike itself that coercively influenced the Charging Party to agree to withdraw the charge as part of the settlement. The General Counsel also claims that allowing withdrawal of a charge after a judge has found the alleged violation will remove the incentive from other parties to settle cases before complaint. For reasons indicated above, we reject these contentions.

[6] The FMCS received notice on September 11, 1989, and assigned a mediator 2 days later. The judge found that Amstar apparently did not speak to the mediator and did not return his telephone calls.

[7] Contrary to our colleague, we are unwilling to conclude that the fact that the settlement was reached while the strike was ongoing is sufficient in and of itself to warrant a finding that the settlement was the result of coercion. Although the issues in this case may appear to be relatively straightforward, that is not to say that the Respondent's defenses are totally frivolous. Thus, further litigation and appeals may well follow the Board's decision in this case. Our colleague would disallow this settlement and require the parties to suffer the consequences of the strike until the matter is fully litigated through the Board and possibly through the courts. This litigation could take months to years. We are unwilling to speculate that the settlement was the result of coercion when the parties themselves are fully satisfied with the settlement reached, the settlement substantially remedies the allegations, and there is no evidence of coercion.

[1] I note that the district court did not disagree with the General Counsel's submission that the strike was unlawful; it simply found that under all the circumstances injunctive relief under Sec. 10(j) of the Act was not warranted.

neither novel nor complex. The Respondent plainly failed to adhere to a clear statutory mandate that it provide the mediation services 30 days to attempt to resolve the labor dispute before launching a strike.[2]

With respect to the terms of the settlement memorandum itself, I note that it does not, as a Board order would require, provide that the Respondent will post an appropriate cease-and-desist notice. Moreover, because the withdrawal of the charge effectively vacates the judge's decision, this incident will not be available for consideration in assessing a remedy in any future case if the Respondent commits another violation like that found by the judge in this case.[3]

The settlement provisions here might represent a reasonable tradeoff if the Respondent had offered to settle at a relatively earlier stage of the litigation, before the judge issued his decision finding the strike unlawful. As the General Counsel points out, however, the Board's acceptance of this settlement at this time, after a substantial expenditure of the Board's limited resources including the efforts to obtain 10(j) relief, would run contrary to our policy of encouraging parties to settle prior to complaint or at least early in the litigation process.

Accordingly, I agree with the General Counsel that the Charging Party's request to withdraw the charge should be denied and that, under the circumstances described above, the public interest in remedying this unfair labor practice overrides the parties' desire that the proceeding be concluded prior to a Board decision on the merits.

[2] The majority overlooks the context of my finding of coercion by asserting that it rests simply on the fact that the settlement was reached after 2 months of an ongoing strike. As I have indicated above, at that point the strike, though already found illegal by the judge, could not be then enjoined. The Charging Party thus had little choice but to settle by withdrawing its charge and thereby escape the immediate economic strictures of the strike rather than continue to endure until, in all likelihood, it achieved vindication before the Board.

[3] Because the parties did not see fit to put into the record all the terms of the settlement agreement, we cannot know whether the other matters referred to in the settlement memorandum—e.g., the Charging Party's rescission of certain disciplinary actions and its payment of backpay to some employees and the Respondent's withdrawal of certain contractual grievances—turn on the legal question in the instant case. If they did, then the Respondent has surrendered nothing of substance in the settlement—only the right to pursue claims that had the same likelihood of success as its position in this case.

Kevin Kitchen, Esq., for the General Counsel.
Anthony T. Scotto, Esq. (Boquki & Scotto), for the Respondent.
Michael P. Devlin, Esq. (Berchem & Moses, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me on October 24, 1989, in Brooklyn, New York.

On October 2, 1989, Amstar Sugar Corporation (Amstar), filed a charge against Union Local 1814, International Longshoremen's Association (Respondent), alleging violations of Sections 8(b)(3) and 8(d) of the Act. On October 6 and 7, a complaint and order amending complaint issued alleging that Respondent engaged in a strike without properly filing the notices required by Section 8(d) of the Act, thereby violating Sections 8(b)(3) and 8(d) of the Act.

Briefs were filed by counsel for the General Counsel, counsel for the Charging Party, and counsel for Respondent. On consideration of the entire record and the briefs, I make the following[1]

FINDINGS OF FACT

Amstar is a New York corporation with its principal office in New York, New York, and a facility located in Brooklyn, New York, where it is engaged in the operation of refining sugar. During the course of its business, Amstar annually sold and shipped sugar products from its Brooklyn, New York facility valued in excess of $50,000, directly to points located in States other than the State of New York. I find Amstar to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

Since 1978 Respondent represented a unit of Amstar's employees embodied in a series of collective-bargaining agreements, the last agreement expiring on September 30, 1989. The unit covered by these collective-bargaining agreements is:

> (a) All of the employees employed in the Charging Party's refinery in Brooklyn, New York, excluding all office and plant clerical employees (other than timekeepers, engineering field clerk, record clerk and assistant record clerk), longshoremen, power house and boiler house employees, electricians and electrician helpers, technical and quality control employees including chemists and other laboratory employees, Research and Development Division personnel, motor truck chauffeurs and helpers, motor truck mechanics and helpers, professional and administrative employees, watchmen, guards and supervisors as defined in the National Labor Relations Act, as amended.
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> (b) All technical and quality control laboratory employees employed in the Charging Party's refinery in Brooklyn, New York, excluding all other employees at said refinery, guards and supervisors as defined in the National Labor Relations Act, as amended.

On July 17, 1989, Amstar received a written notice from Respondent notifying Amstar of a proposed termination or modification of the current collective-bargaining agreement which, as set forth above, expired on September 30, 1989. This notice is required by Section 8(d)(1) of the Act, which provides such notice must be served by the party desiring to terminate or modify an agreement 60 days prior to the expiration date of the agreement.

It was stipulated that a Respondent representative would testify, if called, that notices dated August 30, 1989, and ad-

[1] This decision is based on a stipulated record. No witnesses were called to testify.

dressed to the Federal Mediation and Conciliation Service and New York State Mediation Service were mailed on that date to the respective agencies. It was further stipulated that the New York State Mediation Service received such notice on September 5 and the Federal Mediation and Conciliation Service received such notice on September 11. It was further stipulated that Respondent engaged in a strike on September 30, which strike has continued to date.

Analysis and Conclusion

Section 8(d)(3) of the Act requires that the party desiring termination or modification notify the Federal Mediation and Conciliation Service and the appropriate state or territorial agency simultaneously within 30 days after the notice of the desire to terminate or modify the contract has been sent to the other contracting party (the 8(d)(1) notice).

Section 8(d)(4) of the Act requires that the present agreement continues in full force and effect, without resorting to a strike or lockout for a period of 60 days after such notice (the 8(d)(1) notice) is given, or until the expiration date of such contract, whichever occurs later.

The Board, with court approval, has construed the 60-day waiting period specified in Section 8(d)(4) of the Act to include a waiting period of 30 days from the time notices are given to Federal and state mediation and conciliation services under Section 8(d)(3) of the Act. *Retail Clerks Assn. Local 1179*, 109 NLRB 754 (1954). *Retail Clerks Assn. Local 219 (Carroll House) v. NLRB*, 265 F.2d 814, 818–819 (D.C. Cir. 1959); *Fort Smith Chair Co.*, 143 NLRB 514, 519 (1963), affd. 336 F.2d 738 (D.C. Cir. 1964), cert. denied 379 U.S. 838 (1964).

The Board has emphasized that the mediation services (Federal and state) must have at least 30 days to apply their efforts to avert a strike. *Hooker Chemicals & Plastics Corp.*, 224 NLRB 1535, 1538 (1976); *Retail Clerks Assn. (Carroll House) v. NLRB*, supra; *International Engine Service*, 177 NLRB 516, 517 fn. 4 (1969). Such 8(d)(3) notices must be received by the appropriate agencies at least 30 days before any strike action can take place. *Teamsters Local 572 (Dar San Commissary)*, 223 NLRB 1003 (1976); *Hooker Chemicals*, supra. As set forth in *Dar San*, page 1008, notice is not effective until received by the appropriate governmental agencies.

A second requirement of Section 8(d) is that the notices to the mediation services (8(d)(3) notices) *must be received* by such agencies within 30 days of the service of the notice to the contracting party of its desire to terminate or modify the collective-bargaining agreement (the 8(d)(1) notice). *Hooker Chemicals*; *Retail Clerks*; *International Engine Service*, supra.

In the instant case, it is beyond dispute that Respondent failed to meet both notice requirements. Thus, the 8(d)(1) notice was sent to Amstar on July 17. The 8(d)(3) notices to the mediation services were not sent out by Respondent until at least August 30, more than 30 days from the 8(d)(1) notice.

Similarly the 8(d)(3) notices were not received by the New York State Mediation Service until September 5 and by the Federal Mediation and Conciliation Service until September 11, less than the 30-day period required.

Counsel for Respondent contends that when a notice is delayed for reasons not attributable to the sender it is not equitable to penalize the sender for the delay. Counsel cites *General Maintenance Service Co.*, 182 NLRB 819, 822 (1970), and *Bio-Medical Applications of New Orleans*, 240 NLRB 432, 434 (1979), in support of its contention.

In the first place there can be no excuse for Respondent's failure to meet the requirement that the 8(d)(3) notices must be received by the mediation agencies within 30 days of the 8(d)(1) notice of an intention to terminate or modify an agreement. Under this requirement the 8(d)(3) notices would have had to be sent on or before August 17. If one credits Respondent's offer of proof, the earliest such notices were sent was on August 30.

The situation in the instant case is unlike that in *Bio-Medical* cited by Respondent. *Bio-Medical* was an 8(g) case. In *Bio-Medical*, the union mailed the 8(g) notice to the employer at a time calculated so the employer would receive it in a timely manner and proved this. In the instant case there was no reliable proof as to when such notices were actually sent but even if sent as the Union contends, they would not have been received in the normal course of mail delivery on time. Moreover, in *Bio-Medical*, the hospital had *actual* 10-day notice and was able to take the patient care precautions that are the purpose of Section 8(g). Here the mediation services had far less time than the required 30-day period. Further, in *Bio-Medical*, unlike in the instant case, the union extended the time set forth in the 10-day strike notice.

In *General Maintenance* also cited by Respondent, the Board refused to find that a technically untimely union request for negotiations should relieve the employer of its bargaining obligation and have the drastic effect of renewing three agreements for another full term. There, the contractual provision in question did not equate the serving of notice with receipt. Here, Board law as to Section 8(d) is clear that service occurs only upon receipt. Also, in *General Maintenance*, it was undisputed that the notice was mailed at a time calculated to reach the employer on time. In the instant case, as set forth above, it is highly improbable at best that the notice would have been timely received by the appropriate agencies. Moreover, Respondent did not prove the notices were even sent out on August 30. Further, in *General Maintenance* unlike the instant case, the employer received *actual* notice in a timely fashion. Moreover, the Board found that the employer *waived* its timeliness argument in *General Maintenance* by raising it only at the hearing itself, ''as an afterthought.'' Finally, the Board stressed in footnote 9 that *General Maintenance* was not an 8(d) case, where different considerations apply.

Accordingly, I conclude that Respondent violated Sections 8(b)(3) and 8(d) of the Act by its failure as set forth and described above to send the 8(d) notices to the appropriate mediation services in the timely manner required by Section 8(d) of the Act.

THE REMEDY

Having found that Respondent refused to bargain in good faith in violation of Section 8(b)(3) of the Act by engaging in a strike in violation of the notice requirements as set forth in Section 8(d)(3) and (4) of the Act, I shall recommend that Respondent must file new 8(d) notices both to the Employer and to the appropriate mediation and conciliation services and cease and desist from engaging in a strike or inducing employees of the Employer, Amstar, from engaging in a

strike for the purpose of modifying or terminating its collective-bargaining agreement without first having complied fully with the requirements of Section 8(d) of the Act. *Machinists Airline District 46*, 177 NLRB 516, 519 (1969); *Broward County Carpenters' District Council*, 122 NLRB 1008, 1009 fn. 4 (1959).

CONCLUSIONS OF LAW

1. Amstar is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All of the employees employed in Amstar's refinery in Brooklyn, New York, excluding all office and plant clerical employees (other than timekeepers, engineering field clerk, record clerk and assistant record clerk), longshoremen, power house and boiler house employees, electricians and electrician helpers, technical and quality control employees including chemists and other laboratory employees, Research and Development Division personnel, motor truck chauffeurs and helpers, motor truck mechanics and helpers, professional and administrative employees, watchmen, guards and supervisors as defined in the National Labor Relations Act, as amended.
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> (b) All technical and quality control laboratory employees employed in Amstar's refinery in Brooklyn, New York, excluding all other employees at said refinery, guards and supervisors as defined in the National Labor Relations Act, as amended.

4. Respondent has refused to bargain in good faith with Amstar in violation of Section 8(b)(3) by failing to comply with Section 8(d)(3) and (4) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

[Recommended Order omitted from publication.]